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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

WINTRON DAVID NUNEZ,

Defendant and Appellant.

B212545

(Los Angeles County
Super. Ct. No. NA073631)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Charles D. Sheldon, Judge. Affirmed.

Sarah Farhat, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B.
Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Wintron David Nunez appeals from the judgment entered following his conviction by a jury on two counts of making a criminal threat and his subsequent admission of having suffered a prior serious or violent felony conviction within the meaning of the “Three Strikes law” (Pen. Code, §§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d))¹ and section 667, subdivision (a)(1). Nunez argues the trial court violated his statutory right under section 1025, subdivision (b), to have the same jury decide the substantive offenses and the truth of the prior conviction allegations when the court concluded, after discharging the original jury, a second jury could try the prior conviction allegations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Nunez was charged by information with five counts of making a criminal threat (§ 422). The information specially alleged Nunez had suffered two prior strike convictions and two serious felony convictions within the meaning of section 667, subdivision (a)(1), and had served three separate prison terms for felonies (§ 667.5, subd. (b)). Nunez pleaded not guilty and denied the prior conviction allegations.

The trial court granted Nunez’s motion to set aside two of the five counts of making a criminal threat and dismissed one of the prior strike/serious felony allegations. Nunez did not waive his right to a jury trial or request bifurcation of the remaining prior conviction allegations.

During trial of the criminal threat charges, the People did not present any evidence regarding Nunez’s prior conviction. Nunez introduced evidence in his defense, but did not testify. Neither the jury instructions nor the verdict forms referred to the prior conviction allegations. The jury found Nunez guilty on two counts of making a criminal threat and acquitted him on the third count. Without objection from either the People or defense counsel, the trial court discharged the jury and scheduled a sentencing hearing. No mention was made at this point of the prior conviction allegation or that Nunez might be sentenced as a second-strike offender.

¹ Statutory references are to the Penal Code.

At the sentencing hearing four weeks later, the issue of the prior conviction allegations—and specifically the strike prior—was finally raised. The trial court acknowledged that Nunez had not requested bifurcation of the issue of the alleged prior convictions and had not waived his limited statutory right to a jury trial on the allegations.² Nonetheless, relying on *People v. Saunders* (1993) 5 Cal.4th 580 (*Saunders*), the trial court ruled Nunez had forfeited his right to have the same jury determine the prior conviction allegations by failing to object at the time the jury was discharged. Accordingly, the court ordered the prior conviction allegations could be tried to a newly impaneled jury.

Before setting a new date for trial on the prior conviction allegations, the court inquired whether the People and Nunez could agree on what a reasonable sentence might be. Following a recess and discussion on the record, the court indicated it was prepared to sentence Nunez to prison for seven years eight months (as opposed to the prosecutor's last offer of nine years). At this point Nunez waived his right to a jury trial and admitted the prior conviction alleged as a strike and prior serious felony (assault with a deadly weapon) and also admitted an additional prior conviction for which he had served a prison term.

In accordance with its indicated ruling, the court then sentenced Nunez to an aggregate state prison term of seven years eight months: concurrent 32-month terms (the low 16-month term doubled under the Three Strikes law) on two counts of making a

² It appears the People and the court believed bifurcation had in fact been ordered. If so, their misunderstanding on that point may have been attributable to the 15-month delay between the original trial date and the date trial actually began. At the outset of trial on July 12, 2007, the court declared a doubt as to Nunez's mental competence. Criminal proceedings were suspended, and Nunez was ordered examined by two court-appointed mental health experts. At a hearing in November 2007 the trial court reviewed psychiatric evaluations prepared by the court-appointed experts and found Nunez to be incompetent to stand trial, committed Nunez to the Department of Mental Health and adjourned the proceedings. Following a hearing in August 2008 the trial court reviewed a progress report from Patton State Hospital, found Nunez's mental competence to have been restored and ordered criminal proceedings to resume. The jury trial then began on October 10, 2008.

criminal threat, plus five years for the prior serious felony enhancement. The prior prison term enhancement was apparently dismissed in furtherance of justice.

DISCUSSION

Section 1025, subdivision (b), provides, when a defendant has been charged with both a substantive offense and having suffered a prior conviction, absent an admission of the prior conviction allegation, “the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . or by the court if a jury is waived.”³ Section 1164, in turn, prohibits the trial court from discharging the jury until it has determined the truth of any alleged prior convictions.⁴ This right to have a jury determine the truth of a prior conviction allegation “does not flow from the jury trial provision of article I, section 16 of the California Constitution or the Sixth Amendment of the United States Constitution. It is derived from statute.” (*People v. Vera* (1997) 15 Cal.4th 269, 277 (*Vera*); see *Saunders, supra*, 5 Cal.4th at pp. 587-589, *People v. French* (2008) 43 Cal.4th 36, 47.)⁵

³ Section 1025, subdivision (b), also provides, if the defendant pleads guilty or no contest to the substantive charges, the prior conviction allegation shall be tried “by a jury impaneled for that purpose” unless the defendant also admits the prior conviction allegation or waives his or her right to a jury trial. Section 1025, subdivision (c), limits the right to a jury trial granted by subdivision (b), providing “the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.”

⁴ Section 1164, subdivisions (b), provides, “No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, . . . the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding.”

⁵ Although *Vera, supra*, 15 Cal.4th 269 and *Saunders, supra*, 5 Cal.4th 580 were decided before the United States Supreme Court decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and the general statement in *Vera*, at page 281 that there is “no Sixth Amendment right to jury trial on sentence enhancement allegations” is no longer accurate (see *People v. French, supra*, 43 Cal.4th at p. 47 & fn. 3), nothing in *Apprendi* or the subsequent United States Supreme Court decisions in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d

The trial court in this case violated sections 1025 and 1164 by discharging the jury before it had determined the truth of the alleged prior convictions. (Cf. *People v. Tindall* (2000) 24 Cal.4th 767, 774 [“[a]lthough the same-jury requirement under section 1025, subdivision (b) may not particularly inure to defendant’s benefit, we cannot conclude thereby that defendant has no right to invoke the statute”].) Nonetheless, Nunez’s failure to object precludes his obtaining appellate relief on the basis of this statutory error. (See *Saunders, supra*, 5 Cal.4th at p. 589; *Vera, supra*, 15 Cal.5th at pp. 276-277.)

Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. (*Saunders, supra*, 5 Cal.4th at pp. 589-590.) The rationale for this forfeiture rule is that “[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.” (*Vera, supra*, 15 Cal.4th at p. 276; see *Saunders*, at p. 590.) “[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.” (*People v. Kennedy* (2005) 36 Cal.4th 595, 612.)

As the People argue and as the trial court found, in *Saunders, supra*, 5 Cal.4th at pages 589 through 592 the Supreme Court applied this rule of forfeiture to a violation of sections 1025 and 1164: “[A]lthough section 1025 and 1164 prohibit a trial court from discharging a jury until it has determined the truth of any alleged prior convictions, a defendant may not complain on appeal of a departure from this procedural requirement unless the error has been brought to the attention of the trial court by means of a timely and specific objection.” (*Saunders*, at p. 590.) The *Saunders* Court emphasized the strong policy reasons for enforcing the forfeiture rule in this context, explaining that by enacting sections 1025 and 1164 the Legislature did not intend to enable the defense to “create a procedural trap that would enable defense counsel to ambush the trial judge and

856] confers a constitutional right to a jury trial to determine the truth of sentencing enhancements or factors based upon the defendant’s prior convictions. (*Cunningham*, at p. 282; *Blakely*, at p. 301; see *People v. Towne* (2008) 44 Cal.4th 63, 70-71, 82.)

deprive the People of their statutory right” to prove the truth of the prior conviction allegations. (*Id.* at pp. 590-591.)

Similarly, in *Vera, supra*, 15 Cal.4th 269, in which the defendant argued the trial court had committed reversible error by not obtaining a personal and express waiver of his right to jury trial before discharging the jury and conducting a bench trial on the prior conviction allegations, the Supreme Court held the defendant’s failure to object to the discharge of the jury or to otherwise make the trial court aware of its error precluded the defendant from raising the claim on appeal: “Defendant’s claim that he was deprived of his statutory right to jury trial on the prior prison term allegations does not implicate the state or federal constitutional right to jury trial or the federal due process clause. He was therefore obligated to bring the alleged error to the attention of the trial court in order to preserve his claim for appellate review. Defendant failed to object to the discharge of the jury or otherwise indicate to the trial court his desire for jury trial of the prior prison term allegations. He was thus precluded from arguing for the first time on appeal that the trial court erred by conducting a court trial on the truth of the prior prison term allegations without having first obtained from defendant an express, personal waiver of jury trial. As this court explained a century ago, ‘[t]he defendant can not remain silent and take the chance of a favorable issue, and, losing, urge as [a] ground for reversal an error, which, but for his silence, might never have found its way into the case. His failure to object justly gives rise to the inference that at the time he saw no injury being done [to] him, and he can not complain on being met here by a barrier arising from his own omission.’” (*Id.* at p. 281.)

To be sure, in both *Saunders, supra*, 5 Cal.4th 580 and *Vera, supra*, 15 Cal.4th 269, unlike the present case, trial of the prior conviction allegations had been bifurcated from the jury trial on the substantive offenses at the defendants’ request. (See *Saunders*,

at p. 586; *Vera*, at pp. 272-273.) But this distinction is not significant in term of Nunez’s forfeiture of the procedural rights conferred by section 1025, subdivision (b).⁶

Section 1025, subdivision (b)’s same-jury requirement does not give the defendant an unqualified right to a unitary trial—that is, a trial at which both the substantive charges and the prior conviction allegations are determined at the same time. The trial court itself, through the exercise of its general power to control the conduct of a criminal trial under section 1044,⁷ may order the determination of the truth of a prior conviction allegation in a separate proceeding after the jury has returned a verdict of guilty on the charged offense. (*People v. Calderon* (1994) 9 Cal.4th 69, 75.) Indeed, even if no prior convictions have been alleged, following a verdict on substantive charges the People may move to amend the information or indictment to allege prior felony convictions, provided the jury has not been discharged. (Compare *People v. Valladolid* (1996) 13 Cal.4th 590, 601 [permitting postverdict, but predischarge, amendment of information to charge prior felony convictions] with *People v. Tindall*, *supra*, 24 Cal.4th at pp. 774-775

⁶ In *People v. Saunders*, *supra*, 5 Cal.4th at page 593, the Supreme Court “assume[d], without deciding, that double jeopardy principles apply to allegations of prior convictions,” and held Saunders’s failure to object to the discharge of the jury did not waive his double jeopardy claim. (*Id.* at p. 592, fn. 8; see *People v. Anderson* (2009) 47 Cal.4th 92, 108 [confirming applicability of double jeopardy principles to factual sentencing allegations].) Nonetheless, emphasizing Saunders’s request to bifurcate trial of the prior conviction allegations, the Court rejected his constitutional claim, explaining, “because the anticipated proceedings relating to the alleged prior convictions had not yet transpired at the time the trial court discharged the jury, jeopardy did not then terminate as to those allegations. Accordingly, the conduct of further trial proceedings as to the alleged prior convictions did not place defendant twice in jeopardy.” (*Saunders*, at p. 593.) Because Nunez has asserted only that the trial court violated his statutory right to a jury trial on the prior conviction allegations, we need not address whether the fact those allegations were not bifurcated in the case at bar affects this constitutional analysis. (Cf. *Anderson*, at p. 104 [“[i]n general, if a jury is discharged without returning a verdict, the double jeopardy bar applies unless manifest necessity required the discharge or the defendant consented to it”].)

⁷ Section 1044 provides, “It shall be the duty of the judge to control all proceedings during the trial . . . with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.”

[postdischarge amendment improper].) Similarly, the trial court has broad discretion to reopen a criminal case to permit the introduction of additional evidence (see *People v. Ayala* (2000) 23 Cal.4th 225, 282; *People v. Marshall* (1996) 13 Cal.4th 799, 836) and may even reconvene the jury prior to its discharge to correct an incomplete or irregular verdict. (See *People v. Cain* (1995) 10 Cal.4th 1, 54.) In each such case, even though the defendant has not requested a bifurcated trial on the prior conviction allegations, in practical effect that is what will occur. Nothing in the reasoning of *Saunders, supra*, 5 Cal.4th 580 or *Vera, supra*, 15 Cal.4th 269 suggests if, prior to commencement of the subsequent trial on the prior conviction allegations in these somewhat unusual situations, the trial court were to discharge the original jury without objection from the defendant, the defendant would be entitled to appellate relief on the basis of this statutory error. The same forfeiture rule precludes Nunez’s request for relief.⁸ As the Supreme Court explained in *Saunders*, this rule “does not require the defense to remind the prosecution to present its evidence in a timely fashion, but merely requires the defense to object to the discharge of the jury in the event it wishes to assert its statutory right to have the same jury that found defendant guilty also determine the truth of the prior allegations.” (*Saunders, supra*, 5 Cal.4th at p. 591, fn. 7.)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

⁸ Even if Nunez had not forfeited his procedural rights under section 1025, subdivision (b), by failing to object prior to the discharge of the jury, it is by no means clear, once Nunez elected to accept the trial court’s indicated sentence, waived a jury trial (albeit before a new jury) and admitted the truth of the prior conviction allegations, that he can properly challenge that admission by raising the issue on appeal. (Cf. § 1237.5; Cal. Rules of Court, rule 8.304(b).)